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In The

Supreme Court of the United States

October Term, 1992

GREGORY McCULLOM, et al.,

Petitioners,

-vs-

BOARD OF EDUCATION OF THE PRINCETON CITY SCHOOL DISTRICT, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a public school district and school officials are liable under 42 U.S.C. § 1983 for a teacher's sexual abuse of students where the school officials received only one prior report that the teacher might have sexually abused a child and they responded by thoroughly investigating the report and greatly increasing their supervision over the teacher.

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STATEMENT OF THE CASE

The petitioners have misstated the facts throughout this case. The court of appeals noted this when it observed that the petitioners' argument below "misconstrues the record in several respects" (Petition for Writ of Certiorari at Appendix 20a). The petitioners continue to misstate the facts as they seek certiorari.

Respondents Princeton School District and school officials had notice of only one incident where teacher Jay Clow might have abused someone (Petition for Writ of Certiorari at Appendix 16a and 41a). This incident occurred in early 1987, when Evendale Police Chief Danny O'Malley told respondent School Superintendent Richard Denoyer of an anonymous tip that Clow might have fondled a child's buttocks one or two years earlier. The report was unclear whether Clow's momentary contact with the boy's buttock's was intentional or accidental (Petition for Writ of Certiorari at Appendix 19a-20a). Denoyer asked O'Malley to "find out who this person is and get them to come forward" so that Princeton "could get rid of (Clow)." O'Malley responded that the incident "was a little thing and it may have been an accident and they don't want to make a big deal out of it."

During the summer of 1987, Denoyer was reminded of O'Malley's report when he saw Clow go into a school building with a teen-age boy. Denoyer badgered O'Malley repeatedly to get details of the earlier anonymous report. O'Malley later learned that Brian G. was the boy involved in the report. Denoyer arranged to meet with Mrs. G. Sharonville Police Chief William Nuss, who was Mrs. G.'s brother-in-law, also attended the meeting.

Denoyer convened the meeting to gather information to take disciplinary action against Clow.

At the meeting, Mrs. G. said her son, Brian, who was not a Princeton student, had slept overnight at Clow's house through the Big Brother program. Mrs. G. said Clow had momentarily brushed his hand over the boy's pajamas covering his buttocks, apparently while tucking him in. Chief Nuss said that Clow's conduct was not criminal because it was unclear whether Clow had touched Brian G. accidentally or intentionally.

Petitioners' Statement of Facts is misleading because it does not mention several steps which respondents took to respond to this equivocal report. Respondents pursued the matter vigorously by the following actions:

(1) Denoyer tried to get Mrs. G. to press criminal charges against Clow and to allow her son to testify in a school disciplinary proceeding against Clow.

(2) Denoyer talked to John Hust, Princeton's attorney, to discuss how he should respond to the incident. They discussed whether Denoyer should report the incident to the County Department of Human Services and Hust advised him that he need not do so because the incident had already been reported to two police departments. Denoyer and Hust discussed the existing conditions which ensured that Clow would rarely, if ever, be alone with his students: (a) Anita Parks, a teacher's aide, was in the classroom with Clow virtually the entire time. She had worked as a social worker at University Hospital for ten years handling child abuse cases; (b)

another class joined with Clow's class daily, so the teacher and aide from the other class would also be present; (c) parents visited the class frequently, without prior notice to Clow; (d) Clow was scheduled for an in-depth evaluation, so his supervisor would be visiting the classroom often. Denoyer and Hust also discussed what steps Denoyer could take to monitor Clow more closely, which Denoyer did as set forth below.

(3) Denoyer consulted with Hust and Paul Berninger, Princeton's labor attorney, to find out whether he could fire Clow based on the available information, and they responded in the negative.

(4) Denoyer asked Mrs. G. to allow Jerry Lindahl, a Princeton school psychologist, to interview Brian to find out whether Clow had actually attempted to fondle him. Lindahl called Mrs. G. but Mrs. G. told him that she didn't feel there was any problem and that she didn't see any need for him to interview Brian.

(5) Denoyer asked Chief O'Malley to run a criminal background check on Clow, which proved negative.

(6) Denoyer described the incident to respondent Bobby Cox, the principal at Evendale Elementary School, and told him to watch Clow closely.

(7) Cox increased the number of times he observed Clow's classroom to seven or eight times per day.

(8) Cox relieved Anita Parks, Clow's aide, of all special duties which otherwise might have taken her out of the classroom.

(9) Cox regularly watched Clow leave the school grounds to make sure that Clow was not taking children home with him.

(10) Denoyer called Cox repeatedly (to the point that Cox "got annoyed with the number of calls") asking about the results of his observations of Clow.

(11) Denoyer told Jackie Williams, Clow's supervisor, that there had been an incident between Clow and a young boy. Williams told Denoyer that she was doing an in-depth evaluation of Clow that year. Denoyer told her to watch for any unusual behavior in the classroom and report it to him. She observed Clow frequently throughout the year. Denoyer followed up by asking her whether she had observed anything unusual, but she had not. He also told her to tell Clow not to take the students anywhere in his car, which she did.

(12) Denoyer asked Joanne Olman, the school psychologist, whether she was involved in any sexual abuse cases in the multi-handicapped classes. She responded that she was not. He told her to watch out for any unusual behavior in the multi-handicapped classes.

(13) Respondent David Baker, the assistant superintendent, talked to Cox and Williams more frequently to ask them whether anything unusual was occurring in Clow's classroom.

Petitioners' description of the abuses allegedly perpetrated by Clow is misleading too. Petitioners state that Clow pleaded guilty to "multiple counts of sexual misconduct" (Petition for Writ of Certiorari at 7). However, only one count involved contact with a Princeton student on school grounds. This single count involved Clow surreptitiously videotaping petitioner Max Zinsmeister, unbeknownst to Max or school officials, while Max changed his pants after falling in the mud.

Petitioners' statement that "respondents' own expert has confirmed much of this abuse" (Petition for Writ of Certiorari at 8) is a misstatement. In fact, respondents' expert confirmed very few of the incidents alleged by petitioners.

Petitioners have never attempted to delineate which of the claimed abuses occurred before or after respondents received notice of Clow's alleged abuse of Brian G. in the summer of 1987. Many of the alleged incidents occurred, if at all, prior to that date. Respondents cannot be held liable for incidents which occurred prior to when they received notice that Clow had allegedly abused Brian G.

Finally, petitioners suggest that respondents would have discovered Clow's alleged abuses if they had reported the Brian G. incident to the County Department of Human Services (Petition for Writ of Certiorari at 11-12). This is a misstatement. The Department of Human Services would not have informed respondents of any prior incident involving Clow, for confidentiality reasons. It would not have led to criminal charges against Clow because the police had already concluded that the Brian G. incident was not prosecutable.

ARGUMENT

I. WHETHER A PUBLIC SCHOOL DISTRICT AND SCHOOL OFFICIALS ARE LIABLE UNDER 42 U.S.C. § 1983 FOR A TEACHER'S SEXUAL ABUSE OF STUDENTS WHERE THE SCHOOL OFFICIALS RECEIVED ONLY ONE PRIOR REPORT THAT THE TEACHER MIGHT HAVE SEXUALLY ABUSED A CHILD AND THEY RESPONDED BY THOROUGHLY INVESTIGATING THE REPORT AND GREATLY INCREASING THEIR SUPERVISION OVER THE TEACHER.

Petitioners urge the Court to grant certiorari and hold that "supervising officials in public schools have an affirmative duty to protect children from sexual abuse by teachers" (Petition for Writ of Certiorari at 28). This is in direct conflict with the Court's holding in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Court noted in *DeShaney* that the Due Process Clause limits the State's power to act, but does *not* function "as a guarantee of certain minimum levels of safety and security," and "cannot fairly be extended to impose an affirmative obligation on the State to ensure that (an individual's life, liberty or property) interests do not come to harm through other means." *Id.* at 195.

A school district and its officials are liable under 42 U.S.C. § 1983 for a teacher's sexual abuse of his students only if the abuse occurred because the school officials supervised the teacher so inadequately as to constitute deliberate indifference toward the students' constitutional rights. *Black v. Indiana Area School Dist.*, 985 F.2d 707 (3d Cir. 1993); *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. denied sub nom. Caplinger*

v. Doe, ___ U.S. ___, 113 S. Ct. 1066, *reh'g denied*, 113 S. Ct. 1436 (1993), *reh'g granted en banc, Doe v. Taylor Independent School Dist.*, 987 F.2d 231 (5th Cir. 1993); *Jane Doe "A" v. Special School Dist. of St. Louis County*, 901 F.2d 642 (8th Cir. 1990); *D.T. v. Independent School Dist. No. 16*, 894 F.2d 1176 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied sub nom. Smith v. Stoneking*, 493 U.S. 1044 (1990); *Spann v. Tyler Independent School Dist.*, 876 F.2d 437 (5th Cir. 1989), *cert. denied sub nom. Spann v. Jones*, 493 U.S. 1047 (1990); *Thelma D. v. St. Louis Board of Educ.*, 934 F.2d 929 (8th Cir. 1991); *Gates v. Unified School Dist. No. 449*, 1992 U.S. Dist. LEXIS 8485 (D. Kan. 1992).

These cases hold that students have a constitutional right to be free from a teacher's sexual abuse. Under these cases, school officials are deemed deliberately indifferent to students' constitutional rights if the school officials received notice of a pattern of sexual misconduct by their teachers and then deliberately fail to supervise the teachers, thus proximately causing a teacher to sexually abuse another student. The lower courts have applied this deliberate indifference standard in the foregoing sexual abuse cases decided under 42 U.S.C. § 1983, as well as thousands of other cases decided under the statute involving claimed violations of other types of constitutional rights. This Court has applied the deliberate indifference standard in cases arising under 42 U.S.C. § 1983 for nearly 20 years. *Estelle v. Gamble*, 429 U.S. 97 (1976). Petitioners therefore unfairly misstate the law by claiming there is a "crying need" for this Court to clarify this standard (Petition for Writ of Certiorari at 26).

In the case *sub judice,* respondents had notice of only one incident where Clow might have sexually abused a child. This was the Brian G. incident. The report was very equivocal as to whether Clow's momentary touching of Brian G. was an act of sexual abuse or an accident. Respondents reacted to this incident by thoroughly investigating the report and greatly increasing their supervision over Clow. Respondents acted with diligence, not deliberate indifference.

Petitioners misstate the court of appeals' ruling in this action. Petitioners argue that the court of appeals incorrectly applied the deliberate indifference standard by holding that respondents satisfied this standard because "it cannot be said that appellees 'did virtually nothing' to investigate or monitor Clow's conduct after learning of the possibility that Clow had engaged in improper sexual behavior" (Petition for Writ of Certiorari at 25). This is a misstatement because the petitioners had argued that respondents "did virtually nothing" in response to the Brian G. incident, and the court of appeals was merely rejecting that argument. In fact, the court of appeals correctly outlined and applied the deliberate indifference test in its opinion contained at Appendix 14a-15a of the Petition for Writ of Certiorari.

Petitioners urge the Court to adopt a legal standard which charges school officials with "an affirmative duty to protect children from sexual abuse by teachers" (Petition for Writ of Certiorari at 28). Petitioners urge the Court to hold that "this duty requires active measures to prevent abuse; to train for discovery of abuse; and to supervise adequately to uncover incidents of abuse" (Petition for Writ of Certiorari at 28).

This Court has held that 42 U.S.C. § 1983 requires a political subdivision to provide a minimal level of safety for a person only if the political subdivision has deprived the person of his liberty in situations involving convicted felons, *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); persons under arrest, *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-245 (1983); persons in mental institutions, *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982); or pre-trial detainees, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 545 (1979). A student does not surrender his liberty rights when he enters the school door and this Court has so held for the past 70 years. *Bartels v. Iowa*, 262 U.S. 404 (1923); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

It is ludicrous for petitioners to argue that a student's liberty interest is impaired to the same extent as a convicted felon's or a person in any of the other categories cited above. In fact, the petitioners propose an expansion of the Due Process Clause which is just as unwarranted and unprecedented as in *Collins v. Harker Heights*, ___ U.S. ___, 112 S. Ct. 1061 (1992), where the Court rejected the petitioner's claim that a city owed a federal constitutional duty to provide its employer with minimal levels of safety.

In effect, the standard which petitioners urge the Court to adopt would impose vicarious liability on a public entity for the constitutional torts of its employees. However, this Court has long held that liability cannot be imposed on a public entity under 42 U.S.C. § 1983 based on a *respondeat superior* theory. *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978).

Certiorari is not appropriate in this case under Sup. Ct. R. 10.1(c) because the Court has already addressed the deliberate indifference standard in the content of § 1983 claims for failure to train or supervise. *Canton v. Harris*, 489 U.S. 378 (1989). The case *sub judice* is consistent with that decision as well as the lower court cases cited at page 7 of this brief, where courts have applied the deliberate indifference standard in § 1983 cases involving a teacher's sexual abuse against a student.

Petitioners' real aim can be discerned from a cursory reading of their Petition. Petitioners complain that: (1) the court of appeals failed to correctly apply the deliberate indifference standard to the evidence *sub judice* (Petition for Writ of Certiorari at 17); (2) the evidence of respondents' notice of Clow's misconduct was "inexplicitly (sic) characterized as 'undisputed facts' in spite of the substantially conflicting testimony" (Petition for Writ of Certiorari at 18); (3) the lower courts "ignored" certain testimony from Clow's aide (Petition for Writ of Certiorari at 24). Quite clearly, petitioners seek certiorari to ask this Court to re-weigh the evidence already considered by the trial court, the court of appeals and the state supreme court. This is an improper reason to grant certiorari and is an inappropriate use of this Court's scarce judicial resources.

CONCLUSION

For all the reasons set forth in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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